No. 12914

In The
United States Court of Appeals
For the Ninth Circuit

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellant*,
vs.
KATHLEEN HUTCHENS, *Appellee*.

KATHLEEN HUTCHENS, *Appellant*,
vs.
C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellee*.

Appeal from the District Court of the United States
for the District of Oregon

HONORABLE GUS J. SOLOMON, *Judge*

Combined Answer and Reply Briefs of Cross-Appellee and Appellant C. D. Johnson Lumber Corporation

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MISCELLANEOUS AUTHORITIES

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ANSWER BRIEF OF CROSS-APPELLEE C. D. JOHNSON LUMBER CORPORATION

STATEMENT OF THE CASE

The cross-appellant, Kathleen Hutchens, recovered a $68,377.20 verdict as the result of the death of her husband while at work. (R. 54) Cross-appellee, C. D. Johnson Lumber Corporation, moved in the alternative for

judgment notwithstanding the verdict and for a new trial. (R. 57-63) In an oral opinion rendered after several months deliberation the court rejected the cross-appellee's contentions that there were errors in the trial of the cause but stated that he was concerned with the size of the verdict. (R. 75)

The court after an analysis of the actuarial data involved concluded that though the verdict was not arrived at as a result of passion and prejudice, it was excessive to the extent of $21,877.20. (R. 75-6) The court then stated in its opinion that unless the cross-appellant filed a remittitur of that amount, cross-appellee's motion for a new trial would be granted. (R. 76) On December 18, 1950, cross-appellant filed a motion for a reconsideration of the said opinion conditionally denying cross-appellee a new trial. (R. 63)

After having heard argument of counsel and having received briefs, the court overruled the motion to reconsider on February 9, 1951. (R. 66) In an oral opinion the court, citing authority, rejected cross-appellant's contention that a Federal District Court has no power to require a conditional remittitur in a diversity case where the particular state whose law was being enforced denies to the state courts any such power. The court also rejected cross-appellant's contention that the court acted arbitrarily and capriciously in ordering a reduction of the

recovery to $46,500 as a condition of its denial of a new trial. (R. 77-8)

On February 19, 1951, cross-appellant filed a remittitur of $21,877.20 of which she now complains. (R. 67) Upon the submission of the remittitur, cross-appellee's motions for a new trial and for judgment notwithstanding the verdict were overruled. (R. 68-9) On March 19, 1951, cross-appellee (as appellant) filed a notice of appeal from the judgment entered on the reduced verdict. (R. 81) Thereafter on March 21, 1951, cross-appellant filed a notice of appeal initiating this cross-appeal.

The questions presented are simple and closely related. First, may this court review the discretion of the court below in determining that a new trial should be granted cross-appellee upon the grounds that the verdict returned was excessive if that excessive verdict was not corrected by a remittitur? Second, if said question is reviewable, was there any abuse of discretion in requiring a remittitur of the size submitted by the cross-appellant?

Third, in a diversity case does the rule of *Erie Railroad Co. v. Tompkins* prevent a Federal court from exercising its traditional power to require a conditional remittitur where the state whose law is being enforced denies its own courts any such power by a constitutional provision? If so, can said provision of the Oregon Consti-

tution providing that no fact tried by a jury shall be reexamined unless the court can affirmatively say that there is no evidence to support the verdict prevail in the Federal courts over the different language of the Seventh Amendment to the United States Constitution?

Argument

(1) The reviewability on appeal of the District Court's action in allowing cross-appellant to file a remittitur is a question of federal practice and under that practice acceptance of an option to file a remittitur to cure an excessive verdict is not open on appeal.

(The cross-appellee answers under this heading the argument generally set out under point (1) in cross-appellant's brief from pages 13 through 19.)

The question whether the District Court's action in granting the cross-appellant Hutchens an option to file a remittitur is properly before this court is a procedural question governed by Federal practice and the Federal Rules of Civil Procedure. Cross-appellant, nevertheless, on this point relies solely on state cases.

The Circuit Court of Appeals for the Fourth Circuit has held:

> "The practice which we must follow on appeal, however, is the federal and not the state practice."
> *United States v. Marsh*, 108 F. 2d 558, 559.

In that case the court rejected the contention that it had to give unusual weight to the fact that two juries had decided in favor of the plaintiff as was the case under Virginia practice.

The Fifth Circuit has held that:

> "* * * all questions of preserving and assigning errors, and whether an error is harmless or reversible, are matters of procedure, and in regard to such matters, this court is governed by the rules of practice and procedure in the Federal Court rather than by those in the State Court." *Dallas Ry. & Terminal Co. vs. Sullivan, 108 F. 2d 581, 583.*

See also *Carneige Nat. Bank v. City of Wolf Point*, 110 F. 2d 569, 572, and *Bristol Gas & Electric Co. v. Boy*, 261 Fed. 297, 302.

Under the federal practice the cross-appellant cannot raise on appeal her acceptance of the option given by the trial court to file a remittitur. The leading case is *Woodworth v. Chesbrough*, 244 U.S. 79, 37 Sup. Ct. 583, 61 L.Ed. 1005. The headnote in the official report states the holding as follows:

> "Finding a verdict and judgment excessive, the Court of Appeals gave the party who had recovered them his option to submit to a reversal or obtain an affirmance by remitting part of the judgment. The party having acted on the latter alternative, *Held*, that his cross writ of error complaining of the reduction must be dismissed."

This case was followed in *Bristol Gas & Electric Co. v. Boy*, 261 Fed. 297, 302, where the court held "that the trial judge's action in requiring remittitur as a condition of denying motion for a new trial is not reviewable." (p. 302) This result was reached although the Conformity Act was then in effect and there was a state statute to the contrary involved. Another Circuit Court of Appeals reached the same result without reference to the earlier decisions. *Chickasha Cotton Oil Co. v Chapman*, 4 F. 2d 319, 321. The court held that the party submitting the remittitur below "precluded themselves from seeking a review at the hands of this court." (p. 321)

All three of the earlier cases were cited by Judge Learned Hand in *Mattox v. News Syndicate Co.*, 176 F. 2d 897, 904. He clearly suggests that the acceptance by the plaintiff of a reduced judgment was not appealable. (It should be noted that the last sentence of the opinion is apparently garbled and "bettered" was inserted where the judge apparently meant "worsened.")

A Federal trial court may properly require a remittitur of part of an excessive verdict as a condition for the denial of a motion for a new trial.

In *Northern Pacific R.R. Co. v Herbert*, 116 U.S. 642, 646, 6 Sup. Ct. 590, 29 L. Ed. 755, the court held:

> "2. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It was held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand. (citations)"

The power of a federal court to conditionally require a remittitur was reaffirmed in *Dimick v. Schiedt*, 293 U.S. 474, 483, 55 Sup. Ct. 296, 79 L.Ed. 603, where authorities are collected. A recent case relied on by the court below and which applied the rule laid down by the above two cases is: *Rice v. Union Pacific R. Co.*, 82 F. Supp. 1002.

After a thorough review of the authorities the court there concluded that it had the authority and perhaps the duty "to require a remittitur of the excessive portion of a jury's verdict as a condition to the denial of a new trial." and it exercised that authority. (p. 1008) Other recent cases approving requiring a remittitur as a condition to overruling a motion for a new trial are: *Fornwalt v. Reading Co.*, 79 F. Supp. 921 and *Mattox v. News Syndicate Co.*, 176 F. 2d 897, 904.

The cross-appellant complains of "duress" but is well established that asserting a legal right is not duress. *Chatfield v. Seattle*, 198 Wash. 179, 189, 88 P. 2d 582, 121 A. L. R. 1279. The court below had a legal right to present the cross-appellant with the following alternative: either to have a new trial or to remit enough of the verdict to cure the error inherent therein. The corrected verdict could stand. *Northern Pacific Railroad Company v. Herbert*, 116 U.S. 642, 646, 6 Sup. Ct. 590, 29 L.Ed. 755. The cross-appellant is in the somewhat anomalous position of having secured a judgment against "the appellee, and yet seeking to retract the condition upon which it was obtained." *Woodworth v. Chesbrough*, 244 U.S. 79, 82, 27 Sup. Ct. 583, 61 L.Ed. 1005.

Cross-appellant's attempted qualification of her remittitur is of no effect.

The inconsistency of the cross-appellant's position is not aided by the fact that she made an effort in her remittitur to escape the necessary consequences of her election by asserting:

> "This remittitur is filed without prejudice, in the event the defendant appeals from the judgment entered pursuant to such remittitur, to the rights of the plaintiff to appeal the action of the court in

conditioning its order denying the motion for new trial upon the filing of such remittitur." (R. 67)

The United States Supreme Court was presented with the same sort of attempt in *Woodworth v. Chesbrough, supra.* The remittitur is quoted in the opinion of the Supreme Court and states it was given in compliance within the opinion of the Circuit Court of Appeals:

" '* * * for the sole purpose of obtaining the entry of final judgment herein, and of securing the affirmance of that part of the judgment which is not so remitted, and is intended to be without prejudice to plaintiff in any cross proceeding hereafter prosecuted by him before the Supreme Court of the United States, which cross proceedings follows and continues to be in connection with any proceeding prosecuted in that court by defendant for the purpose of reviewing said judgment of the Circuit Court of Appeals.' " (p. 80)

It is clear that cross-appellant's effort to qualify her remittitur is ineffective because the even more elaborate attempt in *Chesbrough v. Woodworth, supra,* was ineffective. The United States Supreme Court there held that the party remitting was bound by his election. Here the cross-appellant consented to file her remittitur as an alternative to a new trial.

(2) The trial court had the right to require the particular remittitur it did.

(The cross-appellee answers under this heading the argument generally set out under point (2) in cross-appellant's brief from pages 19 through 22.)

The court's opinion makes clear the precise position taken:

> "I do not believe that the amount of the verdict is so disproportionate to the plaintiff's loss as to establish passion or prejudice in the jury's deliberation or to be shocking to the Court's conscience. I also recognize that it is within the province of the jury to determine the amount of damages and that a trial judge should only rarely and reluctantly disturb the jury's findings with respect thereto. However, I feel that, when the verdict of the jury is clearly excessive, it is the duty of the trial judge to refuse to permit such an award to stand.
>
> "I have carefully considered all of the evidence touching upon damages and I believe that the verdict of the jury is excessive to the extent of $21,877.20." (R. 76)

The issue is very narrow: did the court err in requiring a remittitur upon the grounds that the verdict was excessive? The trial court would have committed error had it allowed a remittitur if the verdict was the

result of passion and prejudice. It is only when the verdict is simply excessive that the trial court may allow a remittitur instead of ordering a new trial. *Minneapolis, St. Paul & Sault St. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 51 Sup. Ct. 501, 75 L. Ed. 1243. That case arose in a state court and involved the Federal Employers' Liability Act. A recent case following the rule there announced is: *Fornwalt v. Reading Co.*, 79 F. Supp. 921, 924.

The same rule has been applied in the following diversity cases. In *Brabham v. State of Mississippi*, 96 F. 2d 210, the court said:

> "We understand that while mere execessiveness in the amount to be awarded may be cured by a remittitur, that excessiveness which results from passion and prejudices, however natural the resentment which arouses it, may not be so cured." (p. 214)

The same result was reached in *National Surety Co. v. Jean*, 61 F. 2d 197. In *McCown v. Boone*, 154 F. 2d 19, the United States Court of Appeals for the District of Columbia held that a remittitur was properly required because the trial judge ruled only that the damages were excessive, not that the verdict showed passion or prejudice.

The burden of cross-appellant's attack is on the

claimed difficulties of the trial court in reducing a verdict for wrongful death. It may be conceded that "where damages are unliquidated and there is no fixed measure of mathematical certainty, courts are reluctant to disturb a jury's verdict on the ground of excessiveness, particularly in tort actions for personal injury." *Fornwalt v. Reading Co.*, 79 F. Supp. 921, headnote 2. The court below recognized that a trial judge should only rarely and reluctantly disturb the jury's findings with respect to damages. (R. 76)

There is, however, no question that the trial court could, as it did, require a remittitur to cure an excessive verdict in a *tort* action. In the case of *Northern Pacific R. R. Co. v Herbert*, 116 U.S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755, the court held that the trial court had properly required a remittitur of $15,000 of a $25,000 verdict given a brakeman for the loss of a leg. The case arose prior to the enactment of the Federal Employers' Liability Act and involved the effect of certain North Dakota statutes just as the Oregon Employers' Liability Act is involved here.

The case of *Rice v. Union Pacific R. Co.*, 82 F. Supp. 1002, was the model for the opinion of the court below and is squarely in point. The court there said:

> "Having determined that the verdict, though not the result of passion or prejudice, controlling or

> influencing the jury's deliberation and not shocking to the court's conscience, is, nevertheless, excessive to the extent of $4,000.00, * * *" (p. 1008)

The court then proceeded to enter an order requiring a remittitur as a condition of avoiding a new trial.

Cross-appellant contends that the court below erred in that it had no basis to apportion the verdict and thereby to determine the size of the remittitur. In the Rice case a young woman had been injured in a grade crossing accident and bore scars as a result. The court there cut down an $11,000.00 verdict to $7,000.00, yet only approximately $1,000.00 of each of those verdicts could be attributed to established expenses. The court did not diminish damages on the basis of comparative negligence, but instead reduced unliquidated damages for pain and suffering, disfigurement, and impairment of earning capacity. (p. 1006) The court there had no more mathematical basis than the trial court in the Northern Pacific case. In each case the judge simply decided that the verdict was excessive and reduced it.

In each of the following cases involving unliquidated damages the court held that a remittitur should be filed unless a new trial was to be had despite the fact that in no case did any mathematical basis for apportionment

exist. The courts simply felt that the verdicts were excessive or extravagant and ordered a remittitur:

Cole v. Chicago, St. P.M. & O. Ry. Co., 59 F. Supp. 433, (personal injury; $58,725.25 verdict; $15,000.00 remittitur).

Fornwalt v. Reading Co., 79 F. Supp. 921 (personal injury under Federal Employers' Liability Act; $15,000 verdict; $7,500 remittitur).

Daigneau v. Grand Trunk Ry. Co., 153 Fed. 593 (personal injury; $6,500 verdict; $2,000 remittitur).

Mattox v. News Syndicate Co., 176 F. 2d 897 (libel; $20,000 verdict; $5,000 remittitur)

McCown v. Boone, 154 F. 2d 19 (libel; $7,500 verdict; $5,000 remittitur).

Finally in *Bristol Gas & Electric Co. v. Boy*, 261 Fed. 297, a wrongful death action, the court held that the trial court did not err in requiring half of the $10,000 verdict to be remitted simply on the ground that it was "excessive." (p. 302) The authorities cited show that the Federal courts will on proper occasions impose lump sum remittiturs in unliquidated damage cases.

A wrongful death case presents less difficulty to the court in computing a proper remittitur than a personal injury case. A personal injury case involves fixing a sum for pain and suffering, a subjective experience

of the injured person, and an estimate of the degree of disability suffered. The latter may be ascertained approximately with the help of expert testimony, but there is also involved a further estimate of the probable duration and future amount of disability, that is often a difficult problem even for experts. The estimate of disability must then be related to the kind of and pay for the work the injured man may be able to do in the future.

In a wrongful death case the court is presented with a problem which can be solved by actuarial methods. Depending on the rule of damages adopted it is only necessary in general to ascertain the life exepectancy of either the beneficiary or the person killed and by actuarial computation figure a lump sum based on the dead person's earning capacity or the beneficiary's share thereof.

Here the court's objection to the size of the verdict was based on the fact that the pecuniary loss to the wife is not to be measured by the full net earnings of the husband. (R. 76) Counsel in their brief base their calculations on an asumption that if a man earns $3,000 a year net then his wife's share therof is $3,000. (Brief 21) That assumption is unjustified under the Oregon Employers' Liability Act. The proper measure of damages is stated in *Hansen v. Hayes*, 175 Or. 358, 388, 154 P. 2d 202.

The remittitur imposed is a reasonable one since it must have been based on some such calculation as the following. The average net income of the decedent for the last two years of his life would be about $2,046. (This figure is reached by increasing the 1949 eight months income up to the probable twelve months income.) Assume that the wife's share of the same would be two-thirds, or $1364. That net income to the wife when applied to the actuarial formula presented at the trial would yield a verdict of approximately $46,262.

That is close to the verdict of $46,500 which the court thought proper. The $46,262 would have to be increased by the $974.71 for funeral expenses. Counsel object to the exactness of remittitur being $21,877.20 but it is obvious that the court found a proper verdict to be the round sum of $46,500 and then subtracted the same from the original verdict of $68,377.20. The authorities previously cited sustain the requirement of round sum remittiturs in situations when no real basis of calculation exist and the courts merely determine the verdicts to be excessive. Here the court had adequate mathematical materials with which to properly reduce the excessive verdict in view of a principle of law which was ignored: pecuniary loss to the wife is not measured by the full net earnings of the husband.

(3) The right of a Federal District Court to require a remittitur as a condition for avoiding a new trial is procedural matter and on a precedural matter the state rule is not binding on the Federal courts which must follow the Federal Rules of Civil Procedure. Particularly is this so when to follow a state rule of procedure would be to violate the Seventh Amendment to the United States Constitution.

(The cross-appellee answers under this heading the argument generally set out under point (3) in cross-appellant's brief from pages 22 through 32.)

Cross-appellant seems to assume that her substantive rights under the Oregon Employers' Liability Act are infringed by the District Court's exercise of its firmly established right to require a remittitur as an alternative to a new trial. Cross-appellant ignores Rule 59 a. of the Federal Rules of Civil Procedure which provides in part that:

> "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; * * *"

The power of a federal court to require a remittitur as an alternative to a new trial has been reaffirmed

since the promulgation of the rules. *Fornwalt v. Reading Co.*, 79 F. Supp. 921; *Mattox v. News Syndicate Co.*, 176 F. 2d 897, 904. This court has recognized that the right of the trial court to condition a new trial upon reduction of the verdict is sanctioned by Rule 59 of the Rules. *United States v. Fotopulos*, 180 F. 2d 631, 639 (citing authorities).

Finally, the court in *Rice v. Union Pacific R. Co.* 82 F. Supp. 1002, a remittitur case, specifically observes that the Federal Rules of Civil Procedure have reaffirmed "the applicability on this occasion of federal decisions on the point announced before the effective date of the rules. (citations)." (p. 1008) The rules have the force and effect of a Federal statute. *John R. Alley & Co. v. Federal Nat. Bank*, 124 F. 2d 995; *Windor v. Daumit*, 179 F. 2d 475. In the Erie Railroad Co. case the court excepted matters governed by Federal statutes from the operation of the rule announced, saying:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 Sup. Ct. 817.

The action of the Court in allowing a remittitur as an alternative to a new trial is a procedural matter.

The Rules govern practice and procedure in the Federal courts. The right of the trial court to order a new trail is a procedural question. This court in *Murphy v. United States District Court etc.*, 145 F. 2d 1018, 1020, *cert. dismissed per stipulation*, 325 U.S. 891, 89 L. Ed. 2003, 65 Sup. Ct. 1090 held:

> "On motions for new trial, federal courts are not affected by the conformity statute nor state statutes or practice. The exercise of the court's discretion in passing on a motion for a new trial is a rule of law established by the Supreme Court of the United States and is not controlled by the 'Conformity Act' nor affected by any state statute on the subject."

The Circuit Court of Appeals for the Fourth Circuit has held:

> "The motion to set aside the verdict and grant a new trial was a matter of federal procedure governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice." *Aetna Casualty & Surety Co. v. Yealts*, 122 F. 2d 350, 352; *California Fruit Exchange v. Henry*, 89 F. Supp. 580, 590, *aff'd* 184 F. 2d 517.

There can be no question in view of the foregoing authorities that had the trial court simply ordered a new

trial in this cause the cross-appellant's rights would be controlled by the Federal Rules and not by state law. What the trial court actually did was less prejudicial to the cross-appellant than granting a new trial. Instead of absolutely ordering a new trial the trial court allowed cross-appellant to file a remittitur as an alternative.

The action of the court in so doing was no less a procedural action than absolutely ordering a new trial. Particularly is this so when it is well recognized that a new trial may be granted for excessive damages. As this court stated in *Murphy v. United States District Court, etc.*, 145 F. 2d, 1018, 1020:

> "A Federal District Judge not only has the power and authority but is charged with the duty and responsibility to set aside the verdict of a jury and to grant a new trial when in his judgment and discretion the amount of compensation awarded is excessive. The granting of a new trial is discretionary with the court and subject to no fixed rule except a consideration of what is just. (citations)"

Since granting a new trial for an excessive verdict is a procedural question, it is clear that allowing an alternative to such action, a remititur, is also procedural.

The uniform result test of *Erie Railroad* Co. v. *Tompkins* does not apply to the case at bar.

Cross-appellant seems to contend, however, that since this is a diversity case that the result should have been exactly the same had the suit been brought in the Oregon courts. There are several fallacies in that argument.

First that argument overlooks the fact that the Federal courts have required remittiturs in diversity cases since the Erie Railroad rule was announced: *Mattox v. News Syndicate Co.*, 176 F. 2d 897; *Whitham Const. Co. v. Remer*, 105 F. 2d 371; *Raske v. Raske*, 92 F. Supp. 348; *Rice v. Union Pacific R. Co.*, 82 F. Supp. 1002; *Cole v. Chicago, St. P. M. & O. Ry. Co.*, 59 F. Supp. 443. (The last four cases seem to be clearly diversity cases although the opinions do not affirmatively so state.)

A case which implicitly recognizes the federal supremacy in a situation much like the case at bar is *Burris v. American Chicle Co.*, 120 F. 2d 218. In that case a window cleaner was injured while working. Suit brought under Sec. 202 of the Labor Law of the State of New York and the rules of the Industrial Board of the Department of Labor of the State of New York promulgated thereunder. Section 202 provided in part:

> "On every public building where the windows are cleaned from the outside, the owner, lessee, agent, manager or superintendent in charge of such building shall provide, equip and maintain approved

safety devices on all windows of such building * * *" Consol. Laws, c. 31, *Burris v. American Chicle Co., supra,* 221.

The rules of the Industrial Board provided in part:

"All scaffolds and their supports shall be properly constructed and of ample strength to support safely the maximum number of men plus the weight of the material to be placed on them." *Burris v. American Chicle Co., supra,* 221.

This language is reminescent in certain respects of the Oregon Employers' Liability Act involved in this action. In that action plaintiff obtained a verdict for $35,000. Defendant moved to set verdict aside as excessive and for a new trial. The granting of the motion was prevented by plaintiff's stipulation that judgment might be entered for the reduced amount of $20,000. All parties appealed, plaintiff appealing on the basis of Sec. 584-a of the New York Civil Practice Act. That section granted to New York appellate courts the power to review a stipulated reduction in the verdict and to increase the judgment allowed up to the amount of the original verdict. Despite the existence of this explicit New York statutory right to review a reduction in the verdict, the Second Circuit applied the federal rule as to review of such matters. (p. 223)

In *Palmer v. Miller*, 60 F. Supp. 710, the court deemed the common law controlling and granted a new trial irrespective of a Missouri statutory rule forbidding more than one new trial on the ground that verdict is against the weight of the evidence.

The cases are fatal to cross-appellant's contention which seems to be: cross-appellant brought suit under the Oregon Employers' Liability Act. The Oregon Constitution, Amended Article VII, §3, prevents any remittitur in a case like this. Since the Erie Railroad rule sets as a goal a general uniformity of result despite a choice of different forums, *therefore* the court below erred in imposing such a remittitur. But the American Chicle Company case and the Palmer case show that the Federal rule is controlling here.

Just as the court in the American Chicle Co. case refused to follow a statutory rule regulating New York appellate practice so also here should this court refuse to follow the unique practice rule imposed upon the Oregon courts by the Oregon Constitution. Just as the court in the Palmer case deemed itself bound by the common law rule allowing an unlimited number of new trials despite the contrary Missouri statute so also here should the action of the trial court in requiring a conditional remittitur to be governed by the common law rule and not by the provision of the Oregon Constitution

modifying the common law. *Van Lom v. Schneiderman*, 187 Or. 89, 99, 210 P. 2d 461.

The Seventh Amendment to the United States Constitution is controlling here.

The guiding principles for this appeal are to be found in Rule 59-a where the United States Supreme Court, acting with the power of Congress, has declared that new trials may be granted for any of the reasons for which new trials had been granted prior to the promulgation of the rules. The rule refers us to the preexisting Federal practice, and that preexisting practice as to conditional new trials and remittiturs was based upon the Seventh Amendment to the United States Constitution.

That Amendment provides that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

This language is controlling upon the Federal courts and not the clauses which may be found in the forty-

eight state constitutions. That language controls here rather than the first sentence of Amended Article VII, §3, of the Oregon Constitution which reads:

> "In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict." 9 O.C.-L.A. p. 224.

Cross-appellant relies heavily on *Van Lom v. Schneiderman*, 187 Or. 89, 210 P. 2d 461. In that case the court after having quoted the language of the Oregon Constitution just referred to, states:

> "It will be observed that the first sentence of Art. VII, §3, departs somewhat from the language of Art. I, §17, of the Oregon Constitution and follows closely the language of the federal guaranty up to the last phrase. The Federal Constitution says that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States, *than according to the rules of the common law;*' our present Consitution says 'that no fact tried by a jury shall be otherwise re-examined in any court of this State, *unless the court can affirmatively say there is no evidence to support the verdict.*' The Supreme Court of the United States holds that, 'according to the course of the common law,' a trial court may set aside a verdict which it deems excessive and order a new trial, but that an appellate court has no authority to review the refusal of the trial court to do so.

New York Central & Hudson River R. R. Co. v. Fraloff (1879), supra. And see *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 57 L. Ed. 879, 33 S. Ct. 523, Ann. Cas. 1914D 1029. The same rule prevailed in this state prior to the adoption of Art. VII, §3. The federal and Oregon cases are cited in the Hust case, supra, 180 Or. 430, 431. As stated by the Supreme Court in the New York Central case:

> '* * * * If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy, therefore, rested with the court below, under its general power to set aside the verdict. * * * Whether its action, in that particular was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.'

"It may be assumed that the framers of Art. VII, §3, were not unacquainted with the construction which the Supreme Court of the United States had theretofore placed upon the Seventh Amendment of the Federal Constitution; and it is evident that, while following faithfully the language of the first part of the Seventh Amendment, they deliberately rejected the common law exception therein. When they substituted in the place of that exception the words, 'unless the court can affirmatively say there is no evidence to support the verdict,' they in effect declared their purpose to eliminate, as an incident of jury trial in this state, the common law power of a trial court to re-examine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence." (pp. 98-99)

Counsel for cross-appellant in effect asked this court to eliminate as in incident of a jury trial in a Federal court "the common law power of a trial court to re-examine the evidence and set aside a verdict because it is excessive or in any other respect opposed to the weight of the evidence." To do so would be to abridge the right of the cross-appellee to a jury trial in accordance with the rules of the common law as guaranteed by the Seventh Amendment.

To do so would be to adopt by judicial action a constitutional rule which the Oregon court itself has scathingly criticized. *Williams v. Clemen's Forest Prod., Inc.*, 188 Or. 572, 216 P. 2d 241, 217 P. 2d 252, was a case arising under the Oregon Employers' Liability Act. The court said:

> "This case may be one of great hardship to the plaintiffs. The result will be particularly harsh if the plaintiffs are denied the $5,000 in insurance which the plaintiff Dayle L. Williams at one time elected to accept under the terms of a policy secured by the defendant company. We are constrained to say that if the courts had not been stripped of the statutory powers which they possessed at common law and under statute, (O.C.L., §5-802) we would have upheld the order of the trial court granting a new trial upon the authority of that statute, and of such decisions as *Multnomah County v. Willamette Towing Co.*, 49 Or. 204, 89 P. 389, and earlier cases which are cited in the annotations to O.C.L.A., §5-802. Article VII, section 3 of the constitution adopted since those cases were decided, has deprived the

trial court of the power by granting a new trial, to do justice in this case in which we think the evidence strongly preponderated in favor of the plaintiffs on the issue of risk and danger. Under the constitutional provision, 'no fact tried by a jury shall be otherwise re-examined in any court * * * unless * * * there is no evidence to support the verdict.' when an exorbitant verdict has been rendered for a plaintiff on flimsy testimony despite an overwhelming weight of evidence to the contrary, the impotence of the court to correct the injustice has generally been met with complacence. This case demonstrates that the constitutional provision cuts both ways." (pp. 603-4)

Counsel invites this court to adopt a rule which is recognized nowhere else: "Oregon today occupies in this respect a lonely eminence." *Van Lom v. Schneiderman*, 187 Or. 89, 113, 210 P. 2d 461. In the latter case strongly relied on by cross-appellant the court concludes its reexamination of the difficulties caused by the constitutional provision as follows:

"Whatever our individual opinions may be about the policy involved in Art. VII, §3, we have no right or authority to subvert its obvious purpose or to refuse to apply its provisions to the full extent of their evident meaning. The people may be misled; they may, through ill-considered legislation, bring on themselves evils worse than those they hope to cure; but it is not the business of a court to attempt to save them from the consequences of what it may conceive to be a misguided policy by ignoring or

misinterpreting their expressed will. This is so even though we should think that a system of trial by jury in which the judge is reduced to the status of a mere monitor cannot be expected to survive." (p. 113)

The Seventh Amendment to the United States Constitution does not allow a federal judge to be "reduced to the status of a mere monitor."

The Oregon court's characterization of the relation of judge and jury is not controlling on the Federal courts in this case.

Counsel relies on *Hust v. Moore-McCormick Lines, Inc.*, 180 Or. 409, 177 P. 2d 429, but a state court's classification of a matter as procedural or substantive within the meaning of the Erie rule is not binding on the Federal courts. *Rogers v. American Employers' Ins. Co.*, 61 F. Supp. 142. This is not a conflict of law case where the Federal court must follow the characterization by a state court of a matter as substantive in determining the applicable law.

The Oregon court in the *Hust case* was obliged to classify the relationship between judge and jury as substantive to avoid having to apply its own unfortunate constitutional rule: the court could thereby remand the

case to the circuit court which might require a remittitur as an alternative to a new trial. Hust, *supra*, 436. The rule of *Erie Railroad Co. v. Tompkins* is not in point because "the division of function between court and jury in a federal court is to be made by federal, not state law." *Ettelson v. Metropolitan Life Ins. Co.*, 137 F. 2d 62, 65, *cert. den.* 320 U.S. 777, 88 L. Ed. 467, 64 Sup. Ct. 92; *followed in Logan v. Holman*, 7 F.R.D. 596.

This case is similar to *Belanger v. Great American Indemnity Co.*, 89 F. Supp. 736. There the court recognized that in diversity cases that it was obliged to follow decisions of the courts of last resort in the state where sitting. The court, however, also held where a defense is made based on the Constitution of the United States it cannot follow the state courts but must be guided by the decisions of the Federal courts. Here cross-appellee's defense was not based on the Constitution but it was entitled to the sort of jury trial guaranteed by the Seventh Amendment. Jury trial in the Federal courts has always included a right to correct the mistakes of a jury in returning an excessive verdict by requiring a conditional remittitur.

The case at bar is relatively simple if undue attention is not given to labeling this constitutional right to a remittitur in proper cases as either "substantive" or "procedural." On one side we have the declared policy of

Oregon drastically changing common law jury trial and reluctantly enforced by its judges; on the other we have the Federal Rules of Civil Procedure having the effect of a Federal statute implementing the Seventh Amendment to the United States Constitution. The necessary choice for a Federal court is obvious.

Appellant recovered upon a common law right.

Counsel's argument that the Oregon Constitution should be followed is based on the mistaken assumption that cross-appellant was here attempting to enforce "a statutory right of action which did not exist at common law." That assumption is mistaken. Counsel relies on *Piukkula v. Pillsbury-Astoria Flour Mills*, 150 Or. 304, 42 P. 2d 921, 44 P. 2d 162. That case simply held that the Employers' Liability Act is not a survival statute, but creates a new cause of action which accrues only upon death. *Hansen v. Hayes*, 175 Or. 358, 154 P. 2d 202.

The requirements of the Act are simply expressions in detail of the common law rule that it is a non-delegable duty of the employer to furnish a reasonably safe place in which a servant is to work. *Dickerson v. Eastern & Western L. Co.*, 79 Or. 281, 287, 155 Pac. 175. As the court stated in *Olds v. Olds*, 88 Or. 209, 214, 171 Pac. 1046:

> "The Employers' Liability Act of Oregon is a modified form of the common-law remedy, whereby an employee is permitted to recover from an employer damages for a personal injury which was caused by the latter's negligence."

No detailed analysis of all cases cited by cross-appellant is made here because upon inspection of cross-appellant's brief it will be seen that they are concerned with other problems than that of a conditional remittitur. *Palmer v. Moran*, 44 F. Supp. 704, seems to be the only Federal case involving a remittitur which is cited and is not contrary to cross-appellee's position. The court in granting a remittitur cited several Federal cases. It also cited "Standard Pennsylvania Practice" which is apparently a practice book and not a statute as cross-appellant asserts. (Brief, 27)

Two United States Supreme Court cases involving the Federal Employers' Liability Act are cited by cross-appellant, *Brown v. Western Railway of Alabama*, 338 U.S. 294, 94 L. Ed. 100, 70 Sup. Ct. 105, and *Brady, Administratrix v. Southern Railway Co.* 320 U.S. 476, 88 L. Ed. 239, 64 Sup. Ct. 232. But these cases recognize that a federal right cannot be defeated by the forms of local practice. That is the rationale of the decision in *Hust v. Moore-McCormick Lines, Inc.*, 180 Or. 409, 177

P. 2d 429. Nor can here the right of the appellee to the sort of jury trial provided by the Seventh Amendment be defeated by Oregon practice.

This case cannot be decided upon the basis of generalities about the Erie Railroad rule. Here the specific factor of the Seventh Amendment is directly involved and is controlling. The Erie case itself denies the application of its rule to cases controlled by the Federal statutes and the Federal Constitution. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 82 L.Ed. 1188, 58 Sup. Ct. 817.

CONCLUSION

In conclusion it is submitted that the foregoing argument and the authorities cited therein demonstrate that the cross-appellant's specifications of error are not supported by either reason or authority. There being no error, cross-appellee prays that this cross-appeal be dismissed.

Respectfully submitted,

James Arthur Powers,
Norman N. Griffith

REPLY BRIEF OF APPELLANT C. D. JOHNSON LUMBER CORPORATION

REPLY TO APPELLEE KATHLEEN HUTCHENS' ANSWER TO SPECIFICATIONS OF ERROR I THROUGH X

Appellee contends that Appellant failed to comply with the following part of Rule 19(6) of this court:

> " * * * the appellant* or petitioner, upon the filing of the record in this court, shall file with the clerk a concise statement of the points on which he intends to rely. * * * "

Appellee cites *Williams v. Dodd*, 163 F. 2d 724, but in that case this court refused to consider points which apparently were totally absent from the statement of points filed in that case.

That is not the case here. In this appeal, every point which appellant has argued in its brief was included in its statement of points, which was served on appellee and filed with this court (R. 83-5). The statement of points naturally differs in form from the specifications of error set out in appellant's brief because this court has imposed two different requirements by its Rules 19 and 20. If appellant was required to follow the form for a specification of error in the statement of points, the Rules would so state.

The requirements for a specification of error are set out in detail by Rule 20 (2d) relating to briefs. The requirement of a statement of points is found in Rule 19 relating to printing records. Statement of points are to be concise, that is, not so detailed as a specification of error. As is stated in O'Brien, *Manual of Federal Appellate Procedure*, (3rd Ed. 1941) 207:

> "Moreover, the Statement of Points to be Relied upon in civil cases and criminal cases is not to be treated as sufficient compliance with the Rule requiring detailed Specifications of Error. The Statement of Points indicate in a general manner the points intended to be relied upon, merely informative to counsel opposed and guiding, in a measure, as to the contents of the record on appeal."

As a reading of the whole of Rule 19(6) shows, the purpose of the statement of points is to insure that the appellee is sufficiently warned of the issues so that he may designate additional parts of the record for printing to aid in presenting his defenses.

In this case the appellant designated the whole record for printing including the evidence with three exceptions which are not material. First, pursuant to stipulation of parties and order of this court various exhibits were not printed but are before this court in their original form (R. 329-331). Second, appellant did not

designate for printing matters in the record relating to the cross appeal; appellee Hutchens did (R. 329). Third, appellant did not designate the entire pre-trial conference proceedings; appellee Hutchens, however, designated additional parts for printing (R. 329). Indeed, the appellee below designated as part of the record all of the pre-trial proceedings not designated by the appellant (R. 89).

In short, the entire pertinent record is before this court. Appellee does not complain nor could she that the statements of points did not sufficiently inform her with the result that she failed to designate more of the record for printing. Everything necessary was printed.

Appellee contends that appellant's brief "appears to contain matters not found in the Statement of Points," but does not favor this court with any particular instances (Brief, 2). The trivialness of the appellee's objections are illustrated by her objection that the statement of points do not correspond with the specifications of error of like numbers. In the interest of systematic argument and avoidance of repetition, the specifications of error were given different numbers than the corresponding appeal points; but in each case there is a note at the end of the specification of error to the exact appeal point covered. For example at page 8 of appellant's brief, it is stated of Specification of Error I:

"Said specification of error covers questions raised by Appeal Point 2."

When the specifications of error are compared with the designated appeal points, it will be seen that the specifications faithfully follow the points although, of course, as the rules of this court require, they differ in form.

REPLY TO ANSWER TO SPECIFICATION OF ERROR III

In reply to appellee's answer to Specification of Error III, it must be noted that appellee's counsel conceded that the ruling of the commission determined that decedent was an independent contractor under the circumstances of this case:

"Mr. Babcock: It was determined by the Commission he was an independent contractor in any event, but if he wanted to contend that, that is his contention, but I think it is immaterial.

"Mr. Powers: I don't know what they did. They held he was not an employee and his only other possible status would be an independent contractor. Now, what do you contend?

"Mr. Babcock: I don't contend, except that that fact is entirely immaterial to this proceeding." (R. 98).

Appellee relies on O.C.L.A. § 102-1729 to exclude this ruling here. The pertinent text states:

"* * *. In any third party action brought pursuant

to the provisions of this act, the fact that the injured workman or his beneficiaries are entitled to or have received benefits under the provisions of this act shall not be pleaded or admissible in evidence. A challenge of the right to bring such third party action shall be made by supplemental pleadings only and such challenge shall be determined by the court as a matter of law. * * *"

The said words of the statute restrict its application to cases where a "workman or his beneficiaries are entitled to or have received benefits." Here it was determined that the decedent was *not* entitled to benfits and hence did not receive any benefits. The words of the statute do not extend to the case where the fact is one of exclusion rather than inclusion.

That is also the preferred construction under the policy of the statute, O.C.L.A. § 102-1729 deals generally with the right of the workman to take the statutory benefits or to proceed otherwise. The general purpose of the section is to insure that the workman will receive as a minimum the statutory compensation. If possible, he is to get more either by suing himself or else getting the net gain which the commission obtains by suing on his behalf. Since the purpose of this section is to allow an election to increase recovery above the statutory benefits, it is obvious that awards made by the commis-

sion should not be pleaded or admissible in evidence for to do so would be to defeat the purpose of the section. And as has been pointed out, that is exactly what the words of the statute provide for.

Furthermore, the second sentence quoted from O.C.L.A. § 102-1729 is not pertinent here. The only issue so far as the commission ruling is concerned is whether or not it is admissible as evidence of decedent's employment status, since it is appellant's theory that the employment status of the person injured is one factor in determining whether the Oregon Employers' Liability Act may be invoked by the appellee.

Appellee contends that this determination of the commission is hearsay, but makes no effort to meet the large group of authorities cited in appellant's brief in support of the admissibility of this ruling. Appellee does atttempt to distinguish the Washington cases cited by contending that in Washington, "the Commission is a fact-finding body, and its decision may be upset only on a failure of evidence to support the findings." (Brief, 3). Appellee cites no authority, and her view is incorrect; in both Oregon and Washington the statutes provide for trial de novo in the superior or circuit courts. Rem. Rev. Stat., § 7697; O.C.L.A. § 102-1774. Appellee relies on *Tice v. State Industrial Accident Commission*, 183 Or. 593, 605-7, 195 P. 2d 188, which recognizes that the

provision allowing any fact question in the trial de novo to be determined by a jury in effect sets up a special kind of review of administrative decisions. That is also the law in Washington.

Remington's Revised Statutes, § 7697-2, *Jury trial on appeal—De novo trial—Effect*, provides:

> "In all appeals to the superior court from any order, decision or award of the joint board of the Department of Labor and Industries, either party shall be entitled to a trial by jury upon demand. The jury's verdict in every such appeal shall have the same force and effect as in actions at law. In any such appeal the trial shall be de novo and no party to the appeal shall be permitted to introduce evidence in court in addition to that contained in the departmental record."

That statute should be compared with the following parts of O.C.L.A. §102-1774 upon which the Tice decision is based.

Upon appeal to the circuit court, it provides:

> "The case thereafter shall proceed as other civil cases in said court; provided, that either party thereto may demand a jury trial upon any question of fact.
> * * *
>
> "If the court shall determine that the commission has acted within its power and has correctly construed the law and facts, the decision of the commis-

sion shall be confirmed; otherwise, it shall be reversed or modified; provided, however, that in case of any trial of fact by a jury, the court shall be bound by the decision of the jury as to the question of fact submitted to it. * * *"

(In addition to these specific analogies it should be noted that Rem. Rev. Stat., §7697, §7697-2, and O.C.L.A. § 102-1773, § 102-1774 cover the same ground and are closely analogous.)

Contrary to appellee's assertion, the Oregon commission is a body authorized to determine the facts in a case presented to it. The following synopsis is a general summary of the procedure under the Oregon statute. Claims are initially investigated and determined by the commission staff. "The Commission shall have full power and authority to hear and determine all questions within its jurisdiction." O.C.L.A. 102-1773.

After the initial determination is made, the claimant is notifed of the decision by mail. If the claimant is dissatisfied, he may file a petition for a "rehearing." That is actually his first hearing. At the "rehearing" the claimant may be represented by counsel and present witnesses. The commission does not usually present witnesses. The claimant who is usually the sole witness is examined by his attorney in the presence of a hearing

officer. The hearing officer may question the claimant or other witnesses. A stenographic transcript of the proceedings is made and forwarded to the Commission itself for decision. When the Commission's final order has been made, the claimant may appeal to the circuit court.

"Upon such appeal the plaintiff may raise only such issues of law or facts as were properly included in his application for rehearing." O.C.L.A. § 102-1774. The commission may file with the court "findings, orders, awards or decision of the commission, which may be necessary in the trial of the case, and which, upon being so filed, shall become a part of the records in such case." O.C.L.A. § 102-1774.

The fact that the statutory scheme of review of commission awards provides for trial de novo with a trial by jury does not destroy the various "findings" of the commission since they are administrative determinations which stand if no trial de novo is had. They determine claimant's rights unless set aside on appeal. The fact that an administrative determination may be reopened by a court is a factor going to the weight rather than the admissibility of commission rulings. Here the court below erroneously excluded the ruling in point, thereby depriving it of any weight whatsoever. The Oregon

commission, like the Washington "commission", does determine facts, and those determinations are admissible under the authorities cited. Appellee does not even attempt to challenge any of the appellant's other authorities under this specification.

In regard to Specification of Error VI, appellant does not contend that decedent assumed the risk; appellant does contend that two laws, the Logging Safety Code and the Employers' Liability Act, must both be considered. Appellant does contend that the appellee's decedent did violate the Logging Safety Code which has the effect of law, and that appellee cannot recover under the Oregon Employers' Liability Act for a death which resulted from doing the said unlawful acts. The Act itself only sets up detailed precautions which are satisfied by the provision of a safe place to work. *Dickerson v. Eastern & Western Lumber Co.*, 79 Or. 281, 287, 155 Pac. 175.

Here the reason the decedent was killed was his failure to abide by the precautions required by another law, the Logging Safety Code. Nor is the case of *Suey v. Benson Hotel*, 91 Or. 935, 179 Pac. 239, in point here. The elevator operator there was not violating any state safety law at the time he was injured, nor was he operating his own elevator, as the decedent here was unloading his own truck. Here the decedent was responsible for compliance with the Logging Safety Code.

In Specification of Error VI appellant does not assume that decedent was an employee. O.C.L.A. § 102-1236, however, did require decedent's compliance with the Logging Safety Code. O.C.L.A. § 102-1236 applies to "every employer, employe and *other person.*" (Emphasis supplied). Various cases involving employees are cited because by analogy they would be applicable to an independent contractor in view of O.C.L.A. § 102-1236.

It is noteworthy that appellee makes no answer whatever to Specification of Error VII through IX; and as to Specification of Error X, appellee makes no effort to meet authorities cited by appellant.

REPLY TO APPELLEE'S INDEPENDENT ARGUMENT

Appellee has made its main argument without reference to the ten specifications of error set out in appellant's brief. Confusion of argument has resulted and the purpose of the court's rules requiring specification of errors in order to narrow controversy is largely defeated. To attempt to follow appellee's non-responsive argument in detail would only compound the confusion.

Appellant is content to rest on the arguments set out in its opening brief, but will here point out certain de-

ficiencies in the authorities cited by appellee. On page 7 of her brief, appellee relies on three cases for the assertion that the "and generally" clause extends to all persons having charge of or responsible for any work involving risk or danger to "persons having a lawful or contractual right to be on the property." No one of the cases cited goes so far even by way of dicta, and in fact all three involve employees.

Indeed in one of the cases, the court makes the following statement:

> "5. In the instant case, in order to warrant a recovery by reason of the provisions of the Employers' Liability Act, it is necessary not only that it be shown that defendant was engaged in the kind of work embraced within the terms of that statute, that the plaintiff was defendant's *employee* acting within the scope of his employment. * * *" *Fitzgerald v. O. W. R. & N. Co.*, 141 Or. 1, 10, 16 P. 2d 27. (Emphasis supplied)

This supports appellant's contention that the person injured under the Employer's Liability Act must be an *employee* of some one.

After page 7 of appellee's brief, practically every case cited has been discussed in appellant's brief, and the general propositions which appellee attempts to deduce from them are contrary to the argument and authorities

set out in appellant's brief, especially at pages 6 through 19.

The case of *Clayton v. Enterprise Electric Co.*, 82 Or. 149, 161 Pac. 411, is much relied on by appellee. It was omitted from the table of cases in appellant's brief but is cited at pages 12, 13, and 16. The Clayton case was an early case and its dicta on which appellee relies is inconsistent with the case of *Helzer v. Wax*, 127 Or. 427, 272 Pac. 556. The court in the Helzer case recognized this. Helzer, *supra*, 438; Appellant's Brief, 16.

Turnidge v. Thompson, 89 Or. 637, 175 Pac. 281, is referred to repeatedly by appellant in its brief (e. g. pp. 12, 13, 14, 16), and is here referred to because a quotation from that case set out at page 10 of appellee's brief has been cut down with a misleading effect. The entire quotation follows with the deleted portions inserted in italics:

> "4. The title informs us that the bill provides for the protection and safety of persons 'engaged in' certain work and that the purpose is to extend the liability of employers to their employees; but the title does not contain the remotest intimation that the body of the bill makes the owner liable in damages to a member of the public who is neither 'engaded in' any kind of work mentioned in the title nor an employee of certain persons. *Measured by the rule announced in State v. Shaw, 22 Or. 287 (29 Pac. 1028), the title is not broad enough to confer such a right of action upon a member of the public as such.*

It is true that the opinion in Clayton v. Enterprise Electric Co., 82 Or. 149 (161 Pac. 411), contains language more sweeping than was necessary; but that case is to be distinguished from the facts of the in-instant case, for there, although not an employee of the Enterprise Electric Company, Clayton was nevertheless an employee of Carl Roe, the owner of the motor pump for which the defendant was furnishing electricity, and was engaged in work on and about the electrical appliance that caused his death. Turnidge was neither a person engaged in work on or about the wire nor an employee of the owner of the wire. When measured by its title the Employers' Liability Act is broad enough, so far as it concerns an electric wire, to include both employees of the owner of the wire and also persons 'engaged in' certain work as exemplified in *Clayton v. Enterprise Electric Co., supra*, but it does not go further and give a right of action to every member of the public. *Moreover, aside from any constitutional limitation, it is manifest, for the reasons already pointed out, that it was not the intent of the act to confer a right of action upon every person who might be injured.*

"*The conclusion which we have reached does not necessarily delete the words 'the public' found three times in Section 1 of the act. The words 'the public' retain their appropriate function in measuring the duty owing to those persons who are entitled to sue and also in determining the criminal liability of the persons enumerated in Section 3 of the act.*" (pp. 653-4)

Appellee at page 13 of her brief quotes from the Turnidge case to the effect that the purpose of the

statute is to protect "working men." The court in its opinion relied on and printed the argument in favor of the Act as set out in the official voter's pamphlet which was sent to every registered voter in the state. Part of the quotation states:

> "'* * * This bill does not ask so arbitrary and artificial a thing as that laborers' *wages* be protected and guaranteed by law, but it does ask that the *employer* be compelled to use diligence in protecting the laborer as to his life and limb, while earning *wages;* that a safe place in which to work be provided and that ropes, chains, beams, machinery, etc., be properly tested before the workman is asked to risk his life with them. * * *'" *Turnidge*, *supra*, 650. (Emphasis supplied.)

From the words italicized it is clear that the initiative bill's proponents had in mind the relationship of employer and employee and not that of contracting parties. This quotation provides the setting for the use of the word "workman" in the *Turnidge* case.

Appellant has attempted to answer ten distinct specifications of error by attempting to reduce them to a single question. That cannot be done here, since the law points involved are not, for the most part, dependant on each other. Appellee in the answer portion of her brief has not met the authorities and arguments made under each of appellant's ten specifications of error.

CONCLUSION

For the reasons stated in appellant's opening brief and in this brief, the court below erred in respect to each specification of error presented, and therefore this case should be reversed with direction for judgment for the appellant or for a new trial.

Respectfully submitted,

James Arthur Powers,

Norman N. Griffith.